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No. 80-301

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1980

WAYNE HAVEN NURSING HOME, VALLEY NURSING HOME, PINE REST NURSING HOME, DUNROVEN NURSING HOME, ALLENDALE NURSING HOME, WELLINGTON HALL NURSING HOME and WOODCLIFF LAKE MANOR NURSING HOME,

Appellants,

v.

JOANNE E. FINLEY, M.D., State Commissioner of Health, the HEALTH CARE ADMINISTRATION BOARD and PUBLIC ADVOCATE OF NEW JERSEY,

Appellees.

On Appeal from the Supreme Court of New Jersey

MOTION OF APPELLEE PUBLIC ADVOCATE TO DISMISS

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The Appellee Public Advocate moves the Court to dismiss the appeal herein on the ground that this case does not present a substantial federal question.

I.

THE NATURE OF THE CASE

A. The State Regulation Involved

This appeal raises the question of the facial validity of a state administrative regulation, N.J.A.C. 8:30-14.1 to 14.7. Appellants claim that the regulation on its face takes their property without just compensation in violation of the Takings Clause of the Fifth Amendment to the Constitution of the United States.

This regulation was adopted by the State Commissioner of Health with the approval of the State Health Care Administration Board, after due notice and opportunity to be heard. It has been operative since January of 1978.

Essentially, the regulation requires all newly constructed or existing state licensed nursing homes to make available a "reasonable" number of its beds to indigent persons as a condition of licensure. N.J.A.C. 8:30-14.4(a). The term "indigent" is defined as a person meeting Medicaid eligibility standards, N.J.A.C. 8:30-14.3, thus enabling the nursing homes to obtain reimbursement from the Medicaid program. Pursuant to the regulatory scheme, the State Department of Health determines the number of beds each nursing home must provide to indigent patients. There is an opportunity for agency review should a nursing home disagree with the number of beds it was required to provide, N.J.A.C. 8:30-14.4(b) (i to iv). A key element of the regulation is the provision that a nursing home need not accept indigents if it can demonstrate that it could not make a "just and resonable rate on equity", N.J.A.C. 8:30-14.4(b)(i).

The expressed purpose of the regulation "is to protect and promote the health and welfare of those indigent persons whose health is now or will be in danger because of the acute long-term care bed shortage for the indigent", N.J.A.C. 8:30-14.1.

B. The Proceedings Below

Following agency adoption of the regulation, Appellants took a direct appeal to the Appellate Division of Superior Court, challenging the facial validity of the regulation. The Public Advocate of New Jersey sought to defend the regulation and was granted leave to intervene as a party. Appellants' motion for an interim stay of the regulations was denied (A. 22).[1] The Appellate Division ultimately upheld the regulation (A. 20 to 33). The State Supreme Court, following its grant of certification, unanimously upheld the regulation (A. 1 to 19).

The only record below consists of the material considered by the state agency. This material includes the written comments received by the agency when it proposed the regulation, oral comments received during the course of several meetings of the Health Care Administration Board, and various documents filed with the agency outlining the extent of the nursing bed shortage. The agency concluded, and the reviewing courts found on the basis of the agency record, that many nursing homes either refused to accept or unduly limited Medicaid eligible admissions (A. 3 to 11) and as a result "there is an acute shortage of nursing home beds available for indigent persons," (A. 9).

At the agency level, the nursing home industry contended, among other things, that the propsed regulation took their property without just compensation in violation of the Fifth Amendment to the Constitution of the United States. This argument was renewed by the Appellants herein to the reviewing state courts. Despite the "taking" claim, Appellants neither presented to the agency nor the courts any financial evidence indicating that the operation of the regulation would cause them substantial, irreparable, or, for that matter, any degree of economic injury. Rather, Appellants' sole assertion was that the regulation on its face constituted a taking of their property because their profits would obviously be reduced if they had to treat indigents, even with Medicaid reimbursement.

On this appeal from the decision of the State Supreme Court, Appellants invoke the Takings Clause of the Fifth Amendment.

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1. The designation "A." refers to the Appendix of the Appellants.

II.

ARGUMENT

THIS CASE PRESENTS NO SUBSTANTIAL FEDERAL QUESTION

A. The State Regulatory Scheme Does Not Result in a Taking of Appellants' Property

The Appellants argue that the regulatory scheme in question is constitutionally infirm because the State has restricted the highest use of their property to avoid what would otherwise be a direct obligation of the State, *i.e.*, providing nursing care service to the needy elderly. Essentially, then, what Appellants propose is that the economic injury to them — potential loss of profits — must be borne by the public, rather than remain with the individual property owner. But aside from a bald and legally unsupportable allegation that the State cannot restrict the most profitable use of their property, Appellants advance no other theory which would command the result they seek.[2]

There is no set formula for determing when a governmental regulation constitutes a taking of private property requiring compensation by the public. *Penn Central Transp. Co. v. City of New York*, 438 *U.S.* 104, 123 (1978). The particular circumstances of the case are paramount, and the resolution of the issue turns on ad hoc factual inquiries. *Ibid.* Essentially, the question is resolved by a weighing of private and public interests. The public interest is the extent to which the regulation benefits a public purpose, and

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2. In framing their argument, Appellants do not appear to proceed on the theory that they are entitled to be compensated because they have lost the right to exclude indigent persons at their facilities. Although an essential attribute of private property is the right to exclude others, *Kaiser Aetna v. U.S.*, ___ *U.S.* ___, 100 *S.Ct.* 383, 391-392 (1979), the loss of that right does not in itself entitle the owner to just compensation. *Pruneyard Shopping Center v. Robins*, ___ *U.S.* ___, 100 *S.Ct.* 2035, 2041-2042 (1980). The extent of the economic injury is the foremost concern, and it is that injury that must be balanced against the owners' loss of the right to exclude others. *Ibid.* Here the economic injury is inconsequential. See text at pp. 5-6, *infra*. In any event, under state law the Appellants as nursing home owners have no absolute right to exclude certain members of the public since they operate a quasi-public business which is vital to the health, welfare and safety of all state citizens (A. 10).

the private interest involved is the extent and nature of the economic injury. *Agins v. City of Tiburon*, ___ *U.S.* ___, 100 *S.Ct.* 2138, 2141 (1980); *Penn Central Transp. Co., supra*, 438 *U.S.* at 123-126.

In weighing the private and public interests in this case, it is abundantly clear that the regulation is not violative of the Takings Clause. Even Appellants do not deny the existence of a serious indigent nursing bed shortage. Moreover, the record below is uncontradicted to the effect that many State licensed nursing homes either refuse or severely limit indigent (*i.e.*, Medicaid eligible) admissions, and that as a result the health and welfare of the elderly in need of but unable to obtain nursing care is in jeopardy. Indeed, the State Supreme Court concluded as a factual matter that "the regulations in question are directed at an acute social problem affecting the health and welfare of the needy, aged and infirm," (A. 13). The regulation at issue is thus reasonably necessary to the effectuation of a substantial public purpose, and hence cannot be struck down on the grounds that it does not advance a legitimate state interest. The question then becomes whether the regulation is invalid because it exacts an unduly harsh economic impact upon Appellants' use of their property.

The alleged economic injury to Appellants is diminution of profits. But there is no proof in the record below that Appellants will suffer a loss in profits if they are required to accept Medicaid eligible patients. Moreover, the regulation is not rendered infirm by dint of the Takings Clause even if it can be reasonably assumed that there will be a reduction in Appellants' profits, since "government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law," *Pennsylvania Coal Co. v. Mahon*, 260 *U.S.* 393, 413 (1922). Thus, regulations which have limited the most profitable use of private property have consistently been upheld against constitutional "takings" attacks. See, *e.g. Andrus v. Allard*, ___ *U.S.* ___, *100 S.Ct.* 318 (1979) (upholding regulations which limited commerce in certain species of birds); *Goldblatt v. Hempstead*, 369 *U.S.* 590 (1962) (upholding an ordinance prohibiting excavation below the water level). The approach of the Court has been that a claim of potential loss of profits "provides a slender reed upon which to rest a takings claim," *Andrus v. Allard, supra*, 100 *S.Ct.* at 327, particularly where the regulation involved substantially advances an important public purpose.

Here, the potential loss of profits argument does not even provide a "slender reed" to support the constitutional claim in view of the explicit regulatory guarantee that profits cannot be reduced below a "just and reasonable" return. The economic injury to Appellants, then, is factually and legally insignificant. It certainly is not constitutionally cognizable, for it cannot be said that in the face of a regulation designed to alleviate an acute health crisis the Fifth Amendment will nonetheless be invoked to protect the right of a private property owner to retain a profit margin over and above that which is just and reasonable.

As was pointed out in *Andrus v. Allard, supra*, 100 *S.Ct.* at 327, the resolution of each takings case "calls as much for the exercise of judgment as for the application of logic." Appellants —who operate a quasi-public business — would have the public bear the entire expense of caring for the indigent infirm elderly while they are free to reap whatever profits the market will permit. The Fifth Amendment Takings Clause requires no such thing.

The Public Advocate therefore submits that the regulation under review does not take Appellants' property within the meaning of the Fifth Amendment injunction ". . . nor shall private property be taken for public use, without just compensation."

B. Even if there is a Taking, the State has Provided the Appellants with Just Compensation.

Assuming that the regulatory scheme does result in a taking of Appellants' property, there is nonetheless no substantial constitutional issue presented because the State has offered just compensation. By defining an "indigent" person as one who is eligible for Medicaid, the State has provided the Appellants with the means to receive governmental reimbursement for the care and treatment of those indigent patients Appellants are required to accept. Although Appellants attack this reimbursement method as being constitutionally deficient, they do not directly allege that the level of reimbursement is in itself inadequate.[3] Rather,

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3. An allegation such as that, as pointed out by the Supreme Court below, would have to come via an attack on the regulation as applied, not, as here, on a facial attack (A. 17).

Appellants claim that the constitutional infirmity in the compensation system lies in the fact that in order to receive just compensation they must join the Medicaid program. According to Appellants, they cannot be bound to join what is otherwise a voluntary program. Hence, since presumably Appellants do not wish to join this program, they conclude that they have not received just compensation. But, as the State Supreme Court observed, the regulation in question merely "encourages", but does not compel participation in Medicaid. (A. 17). Just compensation is readily available to Appellants. If they choose not to take it, they cannot be heard to complain.

Since the gist of Appellants' argument is the method, not amount, of compensation, then presumably Appellants would have no basis to complain if the State had decided to pay them compensation equivalent to that of the Medicaid rate without requiring Appellants to join the Medicaid program. It strains the ends of logic, however, to discern any constitutional difference between compensation which is identical in all respects except that, on the one hand, it is paid for wholly out of state funds, and, on the other hand, paid for through the Medicaid program, in which case the State would receive matching federal dollars.

The Public Advocate therefore submits that Appellants have been justly compensated.

CONCLUSION

For these reasons, this Court should dismiss this appeal. Alternatively, if this Court treats this appeal as a petition for certiorari, the petition should be denied.

Respectfully submitted,

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